

N. 3005-

No. 14999

United States
Court of Appeals
for the Ninth Circuit

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM COR-
PORATION, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

FEB 23 1956

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Frank H. Ferguson in Support of Motion to Stay Proceedings.....	62
Affidavit of Stuart L. Kadison in Opposition to Motion to Stay Proceedings.....	57
Exhibit A—Letter dated Aug. 30, 1955, Pacht, Ross, Warne & Bernhard to Twentieth Cen- tury-Fox Film Corp.	59
Exhibit B—Letter dated Aug. 31, 1955, Twen- tieth Century-Fox Film Corp to Pacht, Ross, Warne & Bernhard.....	61
Answer to Complaint.....	49
Appeal:	
Certificate of Clerk to Transcript of Record on	67
Notice of	67
Statement of Points and Designation of Rec- ord on (USCA)	69
Certificate of Clerk to Transcript of Record...	67

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 18714-TC

FRANK ROSS,

Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a New York Corporation, JOHN DOES I through XX and DOE CORPORATIONS I through X, Defendants.

COMPLAINT

[Breach of Contract]

Plaintiff Complains as follows:

I. Jurisdiction

A. Diversity of Citizenship.

As hereinafter more fully appears, plaintiff is a citizen of the State of California, and all of the defendants are citizens of states other than the State of California. Jurisdiction is grounded upon Title 28, U.S.C., Section 1332(a)(1). [2]

B. The Amount in Controversy.

As hereinafter more fully appears, the amount in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars.

II. The Parties

A. Plaintiff Frank Ross:

Plaintiff Frank Ross is a citizen of the State of

California and a resident of the County of Los Angeles, State of California.

Plaintiff is assignee of F. R. Pictures, Inc., a California corporation, now dissolved, of 92% of its interest in the proceeds of a written agreement of sale dated August 11, 1952, by and between F. R. Pictures, Inc., Frank Ross Productions, Ltd. and defendant Twentieth Century-Fox Film Corporation, which said agreement is hereinafter more particularly described. He brings this action in his own behalf and in behalf of the assignees of the other 8% interest in said agreement.

B. Defendants:

1. Twentieth Century-Fox Film Corporation. Defendant Twentieth Century-Fox Film Corporation (sometimes hereinafter referred to as "Fox") is a New York corporation and is a citizen of that state. It conducts its business, and upon information and belief is authorized to conduct its business, in the State of California and in the Southern District of California.

2. The Fictitiously Designated Defendants. Defendants John Doe I through XX and Doe Corporations I through X are sued herein by such fictitious names by reason of the fact that their [3] true names, capacities and identities are presently unknown to plaintiffs. As and when plaintiffs ascertain such true names, capacities and identities, plaintiffs will move the Court to amend this Complaint to reflect the same. On information and belief, none of said defendants who may be indis-

pensable parties herein, are citizens of the State of California.

III. The Agreement of Sale

On or about August 11, 1952, F. R. Pictures, Inc. (sometimes hereinafter referred to as "Pictures") and Frank Ross Productions, Ltd. (sometimes hereinafter referred to as "Productions") on the one hand, and defendant Fox on the other, entered into a written agreement, a copy whereof is annexed hereto and hereinafter referred to as Exhibit A. In full consideration of all of the rights, licenses, privileges and property sold and transferred thereby to Fox, said defendant agreed to pay to Pictures a sum equal to 20% of the net profits, as said term is defined in said agreement and is hereinafter more particularly defined, from the distribution of a motion picture photoplay then tentatively entitled "The Robe", for so long a period as Fox should be required to pay to RKO Radio Pictures, Inc. a portion of said net profits. Thereafter, and commencing with such date as Fox should no longer be obliged to pay any portion of the net profits to RKO Radio Pictures, Inc., Fox agreed to pay to Pictures a sum equal to 25% of the net profits from the distribution of said motion picture.

On or about August 13, 1952, Pictures and Productions on the one hand, and Fox on the other, entered into a written "Supplemental Agreement", a copy whereof is annexed hereto and hereinafter referred to as Exhibit B. [4]

IV. Performance of Conditions Precedent

Pictures and Productions duly performed all of the conditions contained in said agreement of sale, Exhibits A and B hereof, to be performed on their part.

V. Dissolution of Pictures and Assignment of Its Assets to Plaintiff

On February 9, 1953, Pictures filed with the Secretary of State of the State of California, a "Certificate of Winding Up and Dissolution". Prior thereto and on February 3, 1953, Pictures, in writing, transferred, assigned and conveyed 92% of any and all of its assets of every kind and character to plaintiff. Without limiting the generality of the foregoing, on February 3, 1953, in writing, Pictures transferred, assigned and conveyed to plaintiff 92% of the following:

(a) Exhibits A and B hereof;

(b) Any and all monies which, in the absence of said assignment would have been payable by Fox to Pictures under and pursuant to the terms of Exhibits A and B hereof; and

(c) Any and all rights and benefits of Pictures in, under and pursuant to the terms of Exhibits A and B hereof, including, but not limited to, the right to have accountings, and receive, sue for, and collect monies thereunder in the same manner and to the same extent as Pictures could have done in the absence of said assignment. [5]

VI. Negative Cost

Under the terms of Exhibit A and particularly paragraph XIX (h)(1) thereof, within 90 days after the completion of the negative of the motion picture photoplay entitled "The Robe" (which said motion picture photoplay is sometimes referred to as the "Photoplay") Fox agreed to deliver to Pictures an itemized statement of the negative cost of the Photoplay, reflecting the negative cost of the Photoplay computed and determined in the manner set forth in Exhibit A. The negative of the Photoplay was completed on May 8, 1953. Fox failed, neglected and refused to deliver to Pictures said itemized statement of negative cost within 90 days from and after May 8, 1953.

On or about December 5, 1953, Fox did deliver to Pictures a statement of negative cost described on the face thereof as "Incomplete", and on or about September 22, 1954 a final statement of negative cost was delivered to plaintiff by Fox. Neither of said statements were furnished in compliance with the terms of Exhibit A and specifically paragraph XIX(h)(1) thereof.

Prior to the receipt of the statement of September 22, 1954 and immediately after the receipt of said incomplete statement of December 5, 1953, plaintiff notified Fox that said statement was inaccurate. Fox failed and refused to correct the same.

VII.

The statement of negative cost furnished on Sep-

tember 22, 1954 reflects a total negative cost for purposes of plaintiff's participation in profits under the terms of Exhibit A and B hereof in the amount of \$3,837,785.98.

On information and belief said figure of negative cost is incorrect and improper and not in compliance with the terms of Exhibit A and B hereof, and in breach thereof, in that: [6]

A. As part of the negative cost of the Photoplay, Fox included a charge of \$5,000.00 for a Cinemascope lens. Said Cinemascope lens is the property of Fox and should have been treated as a capital expenditure of Fox and in no circumstances included as part of the cost of the Photoplay.

B. Under the terms of Exhibit A, and particularly of paragraph XIX(c) thereof, overhead charges for production of the Photoplay were to be computed in the same manner as the same would have been computed had the photoplay been produced by Universal Pictures Corporation. Reference is made to said paragraph of Exhibit A for the particulars thereof. Under the terms of Exhibit A and particularly of said paragraph, overhead charges were not to exceed 25% of direct charges.

In breach of the terms of Exhibit A, Fox made a charge against the negative of the Photoplay as part of the negative cost thereof, for purposes of computing plaintiff's participation in the net proceeds of the same in the amount of \$1,205,612.07 by reason of general overhead and direct production services. Said figure of \$1,205,612.07 represents 51.695% of the direct costs of the motion picture

after adjustments pursuant to the terms of Exhibit A. Had Fox complied with the terms of Exhibit A in computing overhead charges and in restricting the same to 25% of the direct costs of the Photoplay, the amount charged by way of overhead would have been \$583,043.53, and the net profits of the motion picture photoplay, in which plaintiff is entitled to participate to the extent of 25% thereof pursuant to the terms of Exhibit A, would have been increased by the amount of \$622,568.54.

Despite demand, Fox has failed and refused and still does fail and refuse to adjust its computation of negative cost to conform to the terms of Exhibit A. By reason of such failure and refusal and the breach of the terms of Exhibit A by Fox, plaintiff has been damaged to the extent of 25% of \$622,568.54, or in the amount of \$155,642.08. [7]

VIII. Definitions

Under the terms of Exhibit A and particularly paragraph XI(c) thereof, defendant Fox agreed to pay to Pictures a percentage of the net profits from the distribution of the Photoplay. Said agreement is more particularly alleged in paragraph III hereof and in Exhibit A hereto. Under the terms of Exhibit A, the "net profits" from the distribution of the Photoplay were required to be computed and determined in the same manner as the "net profits" from the distribution of the Photoplay were to be computed and determined under an agreement entered into by Fox on the one hand, and RKO Radio

Pictures, Inc. on the other, under date of August 11, 1952, subject to certain provisions set forth in paragraph XIX of Exhibit A.

Under the terms of said Fox-RKO Radio Pictures, Inc. agreement, a definition of "net profits" was adopted for purposes of accounting as between Fox and RKO, whereby "net profits" were defined as the amount remaining after there should have been deducted from the "gross receipts" of the Photoplay, the "distribution fees" of Fox, the "distribution expenses" of Fox and the "negative cost" of the Photoplay. Under the terms of said Fox-RKO Radio Pictures, Inc. agreement "gross receipts", "distribution fees" and "distribution expenses" were defined as follows:

(a) Gross Receipts:

"The 'gross receipts' of the Picture are hereby defined to mean all monies actually received by Fox for the right to exhibit the Picture by any method or means and from the disposition of distribution or exhibition rights therein. The gross receipts [8] shall include revenue from any reissue of the Picture, but shall not include any revenue from any remake or sequel thereof. The gross receipts shall not include any revenue received by Fox from trailers or from lithographs, lobby displays, slides or advertising accessories prepared and distributed in connection with the Picture. No monies in the nature of security deposits or periodic payments received by Fox or any of its subsidiary corporations or distributing agencies shall be deemed to be in-

cluded as part of the gross receipts unless the same shall have been earned or forfeited. Whenever Fox shall receive monies in partial payment of license fees due for the Picture together with other things, such partial payments shall be allocated, between the Picture and such other things in such reasonable manner as Fox shall determine."

(b) Distribution Fees:

"(i) Twenty-five percentum (25%) of all gross receipts from distribution of the Picture in the United States and its territories and possessions, including Alaska.

"(ii) Thirty per centum (30%) of all gross receipts from all other territories throughout the world where the Picture is distributed by Fox or its subsidiaries.

"(iii) Twenty-five per centum (25%) of all gross receipts received by Fox from sub-distributors of the Picture. Subsidiaries of Fox shall not be considered sub-distributors. Motion Picture Export Association shall be considered a sub-distributor. [9]

"(iv) Ten per centum (10%) of all net proceeds received by Fox from the outright sale of the Picture in a particular territory for a specified period of time for a lump sum consideration, as distinguished from sub-distribution under sub-paragraph (iii) immediately preceding."

(c) Distribution Expenses:

"(i) Cost of positive prints, dupe negatives, lavenders, master and other prints of the Picture.

“(ii) Any and all taxes, imposts, duties, quotas, charges for import permits or permits to transfer currency and governmental fees of any nature which Fox or its subsidiary, affiliated or allied companies shall pay or be required to pay for or in connection with or in respect of said Picture or the distribution, exhibition or other disposition thereof or the collection or transfer of the proceeds, or an account of or measured by the proceeds from the leasing, licensing or distribution thereof, and all disbursements for licenses to permit the distribution of said Picture including, but not limited to, royalties on account of sound recordation or dubbing and music royalties and taxes, provided, however, that nothing herein contained shall be deemed to permit Fox to charge under this subdivision any of the net income, franchise, excess profits, corporation, or other similar taxes, imposed upon Fox or any of its subsidiaries as corporate enterprises, as distinguished from taxes imposed by reason of the distribution of the Picture, or based on the gross receipts thereof.

“(iii) All charges incurred by Fox for cost of procuring copyright, checking expenses, proportionate share of Fox’s dues to Motion Picture Association of America, Inc., proportionate share of losses on all quota pictures properly allocable to the Picture, censorship charges, duties, insurance premiums, cost of re-editing or re-cutting and cost of titles and translations.

“(iv) Expenses, including attorneys’ fees, incurred in preventing infringements of copyright of the Picture, unauthorized exhibition or distribution

of the Picture, and in recovering sums due under exhibition or distribution agreements, including the handling of percentage fraud matters, and also including expenses and attorneys' fees incurred in defending suits based on the Picture and claims in connection therewith. In the event that any such expenses or attorneys' fees incurred by Fox relate not only to the Picture but also to other pictures distributed by Fox, a proportionate share of such expenses shall be allocated to the Picture.

“(v) All cost of replacement or repair of prints or parts thereof and of transportation, packing and handling prints or parts thereof, and of superimposing, dubbing, spotting and recording sound tracks and titles.

“(vi) All expenses or charges for press books, art work, advertising, publicizing and exploitation or the Picture, but not including any expenses or charges for trailers, lithographs, lobby displays, slides or advertising accessories, revenue from which is excluded from gross receipts under the provisions of paragraph (a) of this Article 7.” [11]

IX. Further Breaches and Damage

In addition to the breaches of Exhibit A enumerated in paragraph VII hereof, Fox has further breached and failed to perform the terms and conditions of Exhibit A in the following particulars, to plaintiff's damage in the amount of \$314,474.38, which sum represents 25% of the aggregate of the following particularized breaches of the agreement.

A. Fox has made certain charges hereinafter enumerated as expenses of distribution, which said expenses were in truth and fact expenses of Fox in connection with the exploitation of its process Cinemascope. Said charges were and are institutional charges of said defendant and their inclusion as a portion of the expense of distribution of the Photoplay, is and was unauthorized and in breach of the terms of Exhibit A. There follows a schedule of such improper charges computed to and including March 26, 1955:

(1) Charged for "dupes" and lavenders" production expense of a demonstration motion picture to the end of exploiting Cinemascope—\$64,255.22.

(2) Charged for "U. S. Advertising" the costs of demonstrating Cinemascope—\$159,049.90.

(3) Charged for "Foreign Distribution Expenses" the cost of demonstrating Cinemascope in foreign countries and the expenses of acquisition and transshipment of equipment for the demonstration of the same to foreign countries—\$193,872.74.

(4) Charged for "print costs" the cost of production of a motion picture entitled "Cinemascope Inaugurates New Screen Era"—\$7,650.00. [12]

(5) Charged for "advertising" the cost of advertising Cinemascope and other products of Fox and not the Photoplay—\$168,973.28.

(6) Charged for "Trade Paper Advertising" the cost of advertising Cinemascope and not the Photoplay—\$18,277.05.

(7) Charged for "advertising" the cost of acquir-

ing accessories for Cinemascope and not for advertising the Photoplay—\$11,067.20.

B. To and including March 26, 1955, Fox has included as a portion of gross receipts, for the purpose of calculating its distribution fee, the sum of \$1,210,416.86 received by it by way of cooperative advertising contributions from exhibitors in the United States. Cooperative advertising receipts are by trade, custom and practice, a deduction from gross receipts, and by trade, practice and custom the percentage distribution charges attached to gross film rentals, less monies received by way of cooperative advertising contributions. Stated otherwise, cooperative advertising receipts are not properly a portion of gross film rentals to which the distribution percentages attach. Fox has calculated its distribution percentage on film rentals without first deducting receipts by way of cooperative advertising contributions in the amount of \$1,210,416.86 to and including March 26, 1955, and has thereby increased its distribution charge in violation of Exhibit A, in the United States, by the amount of \$302,604.21 to and including said date. Said defendant has followed a similar practice in Canada and has included in gross receipts the sum of \$41,765.45 received in Canada by way of cooperative advertising contributions to and including said date. Said defendant has thereby increased its distribution charge and reduced the amount to which plaintiff's percentage interest attaches, in violation of Exhibit A, in Canada, [13] by the amount of \$12,529.64, to and including March 26,

1955, and in the aggregate amount of \$315,133.85 in the United States and Canada. By reason thereof, to and including March 26, 1955 plaintiff has been damaged by said practice to the extent of 25% of said aggregate amount, or \$78,783.46.

C. To and including March 26, 1955, Fox has charged as an expense of distribution and as a deduction from gross receipts in arriving at net profit, in violation of the terms of Exhibit A, income taxes in the countries of India, Pakistan and Ecuador, in the aggregate amount of \$50,139.51. Said sum of \$50,139.51 is not a proper expense of distribution and plaintiff has been damaged thereby in the amount of 25% thereof, or \$12,534.88.

D. To and including March 26, 1955, said defendant has paid itself, in United States dollars, by way of distribution charges, the sum of \$269,478.78 for distribution of the Picture in the countries of England, France, Italy and Japan, in all of which countries the proceeds of motion picture distribution are to a substantial extent frozen. Said distribution expense should properly, in the terms of Exhibit A and in accordance with established trade practice and custom, have been paid Fox in the currencies of the countries where they were earned and their payment in United States dollars was unauthorized and in breach and violation of the terms of Exhibit A, to plaintiff's damage in the amount of 25% thereof, or \$67,369.69.

X.

As has been hereinabove noted, the breaches set

forth in paragraph IX hereof include breaches to and including March 26, 1955. On information and belief, Fox has since that date breached Exhibit A in other particulars, all of which are unknown to plaintiff but well known to said defendant. As and when plaintiff ascertains the [14] nature and extent of such further breaches and prior to judgment herein, plaintiff will move the Court for leave to file a Complaint supplemental to this Complaint, reflecting the amount of such further breaches.

Wherefore, plaintiff prays judgment as follows:

1. For and in the amount of \$470,116.46, together with interest thereon at the rate of 7% per annum from and after September 22, 1954;
2. For such other and further amount as may be found due plaintiff by reason of the Supplemental Complaint to be filed herein.
3. For his costs and all proper relief.

PACT, ROSS, WARNE &
BERNHARD,

/s/ By N. JOSEPH ROSS,

/s/ STUART L. KADISON [15]

EXHIBIT A

AGREEMENT OF SALE

This Agreement, made and entered into on this 11th day of Aug., 1952, by and between F. R. Pictures, Inc., a California, corporation, hereinafter sometimes referred to as "Pictures", and Frank

Exhibit A—(Continued)

Ross Productions, Ltd., a California corporation, hereinafter sometimes referred to as “Productions”, said Pictures and said Productions being hereinafter sometimes collectively referred to as “Sellers”, and Twentieth Century-Fox Film Corporation, a New York corporation, hereinafter referred to as “Purchaser”.

Witnesseth:

I.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers’ respective right, title and interest, throughout the world, in and to the following literary works and compositions:

(a) That certain novel entitled “The Robe”, written by Lloyd C. Douglas. Said novel was published in book form by Houghton Mifflin Company and was duly registered for copyright by and in the name of the said Lloyd C. Douglas on October 16, 1942, Entry No. A:168242 in the Office of the United States Register of Copyrights, Washington, D. C.

(b) All adaptations, dramatizations and other versions whatsoever of said novel, including, but not limited to, all screen stories, treatments, scenarios, screenplays and other literary works and compositions, based upon, adapted from, or otherwise related to said novel.

(c) All copyrights and all rights of copyright renewal in and to all of the aforementioned literary

Exhibit A—(Continued)

works and compositions set forth in paragraph (a) and paragraph (b) immediately preceding. [16]

II.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to each and all of the following contracts, agreements, assignments and/or documents covering or relating to said novel entitled "The Robe":

(a) Option Agreement, executed under date of June 26, 1942, by Lloyd C. Douglas and Houghton Mifflin Company in favor of Frank Ross.

(b) Option Agreement, dated November 14, 1942, executed by Lloyd C. Douglas and Houghton Mifflin Company in favor of Frank Ross.

(c) Letter, dated November 27, 1942, from Frank Ross, Inc. to Lloyd C. Douglas and Houghton Mifflin Company.

(d) Agreement, dated December 3, 1942, between Lloyd C. Douglas, as Author, Houghton Mifflin Company, as Publisher, (said Author and Publisher being sometimes designated therein as "sellers"), and Frank Ross, Inc., a California corporation, as Purchaser. Said Agreement was recorded on August 29, 1947, in Volume 641, Pages 51-59, in the Office of the United States Register of Copyrights, Washington, D. C.

(e) Letter Agreement, dated May 5, 1943, be-

Exhibit A—(Continued)

tween Frank Ross, Inc., Frank Ross Productions, Ltd., Lloyd C. Douglas and Houghton Mifflin Company. Said Letter Agreement was recorded on August 29, 1947, in Volume 641, Pages 60-61, in the Office of the United States Register of Copyrights, Washington, D. C.

(f) Assignment, dated June 4, 1943, executed by Frank Ross, Inc. in favor of Frank Ross Productions, Ltd. Said Assignment was recorded on August 29, 1947, in Volume 641, Page 62, in the Office of the United States Register of Copyrights, Washington, D. C.

(g) Assignment, dated January 4, 1944, executed by Frank Ross Productions, Ltd. in favor of F. R. Pictures, Inc.

(h) Consent, dated March 7, 1944, executed by Houghton Mifflin Company and Lloyd C. Douglas, approving the assignment executed by Frank Ross Productions, Ltd. in favor of F. R. Pictures, Inc., described in paragraph (g) of this Article II. [17]

III.

Under date of April 15, 1943, an Agreement was executed by and between Productions, as Producer, and RKO Radio Pictures, Inc., a Delaware corporation, (hereinafter in this Agreement referred to as "RKO") as Distributor, relating to the production and distribution of a motion picture photoplay to be based upon said novel entitled "The Robe". Said

Exhibit A—(Continued)

Agreement has heretofore been amended in various particulars.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to the following:

(a) The proposed motion picture photoplay which was to have been produced and distributed under said Agreement, dated April 15, 1943, as amended.

(b) All screen stories, treatments, scenarios, screen-plays and other literary material created, written or composed in connection with the preparation, production, advertising, publicizing, exploitation and/or other use of the proposed motion picture photoplay referred to in paragraph (a) immediately preceding, and all copyrights and all rights of copyright renewal in and to all of said literary material.

(c) All personal property of every kind, character and description, fabricated or manufactured in connection with the preparation, production, advertising, publicizing, exploitation and/or other use of the proposed motion picture photoplay referred to in paragraph (a) of this Article.

The grants in this Article specified shall not be deemed to be in limitation of the grants in Article I hereof specified.

Exhibit A—(Continued)

IV.

All of the rights, licenses, privileges, property and other interests sold, granted, conveyed and assigned by Sellers to Purchaser under Articles I, II and III of this Agreement are hereinafter collectively referred to as the "Property". [18]

V.

Sellers do hereby jointly and severally sell, grant, convey and assign unto Purchaser, its successors and assigns, forever, all of Sellers' respective right, title and interest, throughout the world, in and to the following:

(a) All contracts, agreements, assignments and/or other documents of every kind and character whatsoever under which Sellers, or either of Sellers, may have heretofore acquired or may hereafter acquire any right, title or interest in or to said "Property".

(b) All rights, licenses, privileges, property and other interests of every kind and character heretofore acquired or which may hereafter be acquired by Sellers, or either of Sellers, with respect to said "Property", and the benefit of all representations, warranties, covenants and agreements made by any person, firm or corporation under any and all contracts, agreements, assignments, and/or other documents, whether written or oral, relating to said "Property".

Exhibit A—(Continued)

VI.

Sellers represent and warrant to Purchaser:

(a) That all of the consideration provided to be paid under each and all of the contracts, agreements, assignments and/or other documents in Article II hereof referred to has heretofore been paid in full and/or otherwise discharged in full; that there is no existing or outstanding obligation whatsoever, either present or future, under any of said contracts, agreements, assignments, or other documents with respect to the payment of any consideration, monies or other compensation whatsoever thereunder; that all of the terms, covenants and conditions provided to be kept or performed under each and all of said contracts, agreements, assignments, and/or other documents have been kept and performed up to and including the date hereof; and that there is no existing breach or other act of default under any of said contracts, agreements, assignments or other documents.

(b) That the contracts, agreements, assignments and/or documents which are being delivered by Sellers to Purchaser concurrently herewith and pursuant to Article VIII hereof have not been amended, modified, supplemented or cancelled, except to the extent indicated in such contracts, agreements, assignments and/or documents. [19]

VII.

Sellers do hereby agree that Sellers shall at all

Exhibit A—(Continued)

time indemnify and save harmless Purchaser or successors, assigns, distributees and licensees from and against any and all claims, demands and/or cause of action arising out of or resulting from any breach by Seller of any of Seller's representations or warranties under this Agreement.

VIII.

Concurrently with the execution hereof, Seller shall deliver to Purchaser the following:

(a) Executed originals or executed duplicates/originals of each and all of the contracts, agreements, assignments and/or documents specified in Article II hereof.

(b) All manuscripts of the literary works and composition in this Agreement referred to, and which may be in the possession of Seller.

(c) All personal property described in paragraph (d) of Article III hereof and which may be in the possession of Seller.

IX.

Seller shall upon request of Purchaser duly execute, acknowledge and deliver to Purchaser any and all further assignments or other instruments which may be necessary in order to carry out, assign or confirm unto Purchaser or to confirm in any country in the world the rights in said "Property" herein granted to Purchaser.

Exhibit A—(Continued)

X.

Purchaser agrees to produce and distribute a motion picture photoplay to be based upon or adapted from said novel entitled "The Robe", which motion picture photoplay is hereinafter referred to as the "Picture". The Picture shall be a feature length, talking motion picture photoplay, with dialogue, music and sound. Purchaser agrees to commence principal photography of the Picture not later than November 2, 1953. Purchaser shall have the sole and complete control of the production, distribution, exhibition, exploitation, advertising, publicity and/or any other use of the Picture.

XI.

(a) Pursuant to the Agreement, dated April 15, 1943, between Productions and RKO (referred to in Article III hereof), RKO has heretofore advanced to Productions certain sums in connection with the preparation, production, advertising, publicizing and exploitation of the motion picture photoplay provided for under said Agreement. Said sums advanced by RKO are hereinafter referred to as the "RKO Costs". Under date of August 21, 1944, Productions executed in favor of RKO a Chattel Mortgage, Pledge and Assignment covering said "Property", as security for the repayment of RKO costs. RKO has heretofore brought an action against Productions in the District Court of the United States, for the Southern District of California, Cen-

Exhibit A—(Continued)

tral Division, seeking to foreclose said chattel mortgage, which action is numbered 10892-C in the files and records of said Court. Productions has filed in said action its answer and a counterclaim for declaratory relief and damages. Houghton Mifflin Company and the Executor of the Estate of Lloyd C. Douglas have filed in said action a motion to intervene therein, which motion has been ordered off calendar with leave to resubmit.

(b) Under date of August 11, 1952, an Agreement is being executed by and between Purchaser and RKO (which Agreement [21] is hereinafter referred to as the "Fox-RKO Agreement"). In the Fox-RKO Agreement, it is set forth that the total amount of the RKO Costs is in the sum of Eight Hundred Nineteen Thousand Seven Hundred Forty-Eight Dollars and Six Cents (\$819,748.06), subject to adjustments as therein provided. The Fox-RKO Agreement provides, among other things, that RKO sells unto Purchaser all of RKO's right, title and interest in and to said "Property"; that in consideration of the rights, licenses, privileges and property sold by RKO to Purchaser under the Fox-RKO Agreement, Purchaser has paid to RKO the sum of Three Hundred Thousand Dollars (\$300,000.00), and that Purchaser shall pay to RKO a sum equal to ten percent (10%) of the "net profits", if any (as computed and determined in the Fox-RKO Agreement), from the distribution of the Picture, until such time as RKO has been paid

Exhibit A—(Continued)

thereunder a total amount (including said sum of Three Hundred Thousand Dollars (\$300,000.00) equal to the total amount of the RKO Costs.

(c) In full consideration of all the rights, licenses, privileges and property sold and transferred by Sellers to Purchaser hereunder:

(i) Purchaser shall pay to Pictures a sum equal to twenty percent (20%) of the "net profits", if any (as herein computed and determined), from the distribution of the Picture so long as Purchaser shall be required to pay to RKO, under the Fox-RKO Agreement, the portion of "net profits" in paragraph (b) of this Article specified.

(ii) At such date as RKO shall have been paid, under the Fox-RKO Agreement, the total amount of the RKO Costs, then, from and after such date (and in lieu of said twenty percent (20%) of the "net profits" specified in the paragraph immediately preceding), Purchaser shall pay to Pictures a sum equal to twenty-five percent (25% of the "net profits",) if any (as herein computed and determined), from the distribution of the Picture. [22]

It is agreed that the "net profits" under this Agreement shall be computed and determined in the same manner as the "net profits" are computed and determined under the Fox-RKO Agreement.

Sellers acknowledge that Purchaser has made no representation, warranty, guaranty or other agreement that any "net profits" will result from the distribution of the Picture.

Exhibit A—(Continued)

The sale or issuance of this profit participation is authorized by a permit of the Commissioner of Corporations of the State of California, and the profit participation interest assigned herein is subject to all of the terms and conditions set forth in said permit.

XII.

Sellers are entering into this Agreement upon the condition that RKO shall agree to do and shall do the following:

(a) To dismiss with prejudice the complaint filed by RKO in the aforementioned action (RKO vs. Productions).

(b) To accept payment of the RKO Costs in the manner specified under the Fox-RKO Agreement and referred to in paragraph (b) of Article XI hereof.

(c) To forbear from bringing any action to collect the RKO Costs from any source except under the Fox-RKO Agreement.

(d) To release the aforementioned "Property" Assigned by Sellers to Purchaser hereunder from any lien RKO may have thereon.

XIII.

In further consideration of the execution of this Agreement by Purchaser, Productions shall dismiss with prejudice its aforementioned counterclaim in the aforementioned action (RKO vs. Productions)

Exhibit A—(Continued)

at such time as RKO shall dismiss with prejudice its complaint in said action. [23]

XIV.

By Assignment, dated March 3, 1952, Betty Douglas Wilson and Virginia Douglas Dawson, distributees under the Last Will and Testament of Lloyd C. Douglas, deceased, and Houghton Mifflin Company, as assignors, jointly and severally assigned to Management Corporation of America, a California corporation, as assignee, all of their right to repurchase the rights assigned and conveyed by Lloyd C. Douglas and Houghton Mifflin Company to Frank Ross, Inc. under that certain Agreement, dated December 3, 1942, relating to said novel entitled "The Robe".

In consideration of the payment by Purchaser to said Management Corporation of America of the sum of Fifteen Thousand Dollars (\$15,000.00), Sellers will cause to be delivered to Purchaser, concurrently with such payment, an assignment, executed by said Management Corporation of America, in favor of Purchaser, and in form satisfactory to Purchaser, under which said Management Corporation of America assigns to Purchaser all of its right, title and interest in and to said novel entitled "The Robe", under the aforementioned Assignment, dated March 3, 1952, or otherwise, and further, Sellers shall cause to be filed in the aforementioned action (RKO vs. Productions) an appropriate stipulation

Exhibit A—(Continued)

providing for the dismissal or withdrawal of the motion to intervene filed in said action by Houghton Mifflin Company and the Executor of the Estate of Lloyd C. Douglas.

XV.

Purchaser has succeeded to all of the right, title and interest of RKO in and to the aforementioned Agreement, dated April 15, 1943, as amended, between Productions and RKO. Concurrently herewith, and in further consideration of the execution of the within Agreement by Purchaser, Productions agrees to execute and deliver to Purchaser an instrument, in form satisfactory [24] to Purchaser, terminating and cancelling said Agreement of April 15, 1943, as amended.

XVI.

Under date of August 23, 1948, an Agreement was executed by and between Productions and Maxwell Anderson. Such Agreement provides, among other things, that the said Maxwell Anderson will write a "screenplay for 'The Robe'".

In consideration of the payment by Purchaser to the said Maxwell Anderson of the sum of Ten Thousand Dollars (\$10,000.00), Sellers shall cause to be delivered to Purchaser, concurrently with such payment, an instrument, executed by and between Productions and the said Maxwell Anderson, and in form satisfactory to Purchaser, terminating such Agreement of August 23, 1948, and all rights of the said Maxwell Anderson thereunder.

Exhibit A—(Continued)

XVII.

This agreement shall bind and inure to the benefit of the parties hereto and their successors and assigns forever.

XVIII.

It is agreed that the representation, warranties, promises, agreements and obligations of Sellers under this Agreement shall be deemed to be joint and several.

XIX.

As hereinabove specified, the "net profits" from the distribution of the Picture under this Agreement shall be computed and determined in the same manner as the "net profits" from the distribution of the Picture are computed and determined under the Fox-RKO Agreement, as executed under date of August 11, 1952, subject, however, to the provisions hereinbelow set forth: [25]

(a) The "net profits" from the distribution of the Picture under this Agreement shall be computed by deducting Purchaser's distribution fees, distributing expenses (such as cost of prints, advertising, etc.) and negative cost from the gross receipts of the Picture throughout the world, subject to the particular matters mentioned below.

(b) Purchaser's distribution fees shall be:

25%—distribution in the United States and Alaska;

30%—distribution in Canada and all other foreign territories;

Exhibit A—(Continued)

25%—sub-distribution;

10%—outright sales.

(c) The charge to negative cost on account of Purchaser's overhead shall be twenty-five percent (25%) of direct charges. However, if Purchaser's charge on account of overhead normally includes items of cost for which Universal Pictures Corporation makes a direct charge, Purchaser may also make a direct charge for such items, and if Purchaser does so and if the charge of Universal Pictures Corporation on account of overhead normally includes items of cost for which Purchaser makes a direct charge, Purchaser will not make direct charges for such items but will include such items of cost in Purchaser's charge on account of overhead; provided, however, that in no event shall Purchaser's charge on account of overhead be reduced below twenty-five percent (25%) by reason of such adjustments.

(d) The sum of Three Hundred Thousand Dollars (\$300,000.00) specified in paragraph (b) of Article XI hereof as having been paid by Purchaser to RKO, shall be included in negative cost without studio overhead.

(e) There shall be no direct charge to negative cost on account of the salary of the leading man in the Picture.

(f) In no event shall any profit participations which may be payable to the leading man in the Picture, or to RKO, or to any other person, firm

Exhibit A—(Continued)

or corporation be chargeable against Pictures in computing the portion of "net profits" to which Pictures may be entitled under this Agreement.

(g) 1. Unless the laws or currency regulations of a country or territory totally or partially prohibit or restrict the withdrawal of monies therefrom, all sums received by Purchaser or its subsidiary corporations from the distribution or sale or other disposition [26] of distribution or exhibition rights in the Picture in any place foreign to the United States, under contracts made in terms of foreign currency, shall be transferred into United States dollars as reasonably promptly as the laws of the foreign country or territory and prevailing conditions will permit. Purchaser shall account for these sums in dollars at the actual rate of exchange, averaged over the reporting period, at which such monies were actually received by Purchaser in the United States. In no event shall any amounts derived from the distribution of the Picture in any country or territory other than the United States be deemed to accrue or be remittable to or for the account of Pictures unless and until such amounts have been actually received by Purchaser in the United States in dollars or are paid pursuant to subdivision 2. or subdivision 3. of this paragraph (g).

2. With respect to any country or territory whose laws or currency regulations totally or partially prohibit or restrict the withdrawal of monies

Exhibit A—(Continued)

therefrom, if Pictures shall so request Purchaser in writing, and if the applicable laws and regulations so permit, Purchaser shall deposit to the credit of Pictures, in a bank or banks in such country or territory approved by Pictures, or pay to such person or persons as Pictures shall designate in writing, any or all monies in the currency of said country or territory accruing to Pictures as its share of "net profits" from the distribution of the Picture therein. Purchaser will report to Pictures the sums so deposited or paid at the time of making the reports of gross receipts hereunder, and such deposits or payments shall constitute the remittance of the sums due Pictures hereunder to the extent so paid or deposited. Accountings by Purchaser of monies derived from countries or territories whose laws or currency regulations prohibit or restrict the withdrawal of monies therefrom may be made in the currency of such countries. Any expenses of Purchaser which are reimbursable under this Agreement and which may be incurred by Purchaser in United States dollars for or in such countries or territories, may be recouped by Purchaser in United States dollars from any monies received from the distribution of the Picture.

3. If payment is not made under subdivision 2. above and funds are withdrawn and actually received in the United States by Purchaser from a foreign country or territory whose laws or currency regulations permit only a partial withdrawal

Exhibit A—(Continued)

of funds, the portion of the funds so actually received by Purchaser which shall be allocated to the Picture in such country or territory may be made on such reasonable basis as Purchaser shall have at the time generally adopted for allocations of funds received from such country or territory or shall be that portion of the funds so actually received in dollars by Purchaser in the United States, which the gross receipts from the distribution of the Picture in said foreign country or territory bears to the total gross receipts of Purchaser in said foreign country or territory for the period for which the withdrawal applies. [27]

(h) 1. Purchaser agrees to keep full and accurate records of the negative cost of the Picture during the entire course of production thereof, which records shall show the details of such negative cost. Within ninety (90) days after completion of the negative of the Picture, Purchaser agrees to deliver to Pictures an itemized statement of the negative cost of the Picture, which statement shall show such negative cost computed and determined as herein set forth. Such statement may be changed, after it is delivered, to give effect to any items overlooked in its preparation, to correct any error in computation of any item included therein, or to give effect to any proper reallocation of charges. Any such change may be made within ninety (90) days after the completion of the annual audit of Purchaser's books next following completion of the

Exhibit A—(Continued)

negative of the Picture. At any time during the period of sixty (60) days after the receipt by Pictures of the said statement, Pictures shall have the right to commence an audit, at its own expense, of the said books and records for the purpose of verifying the correctness of said statement. Said audit shall be completed within thirty (30) days after the commencement thereof. If Pictures fails to commence an audit as hereinabove provided, then the negative cost of the Picture as set forth in said statement shall be conclusively presumed to be correct. If, on the basis of said audit, Pictures claims that the negative cost of the Picture is incorrectly stated in said statement, Pictures may so notify Purchaser, in writing, not later than thirty (30) days after completion of said audit, stating the particulars in which Pictures claims such statement to be inaccurate, and stating the amount which Pictures claims to be the correct negative cost of the Picture. If Pictures fails to so notify Purchaser, then the negative cost of the Picture shall be conclusively presumed to be as set forth in said statement. If Pictures notifies Purchaser, in accordance with the foregoing provisions, that Pictures claims that the negative cost of the Picture is incorrectly stated in said statement, then within thirty (30) days after receipt by Purchaser of said notice from Pictures, Purchaser may make a written demand that the matter be submitted for and determined by arbitration as hereinafter provided. If Purchaser

Exhibit A—(Continued)

does not make such demand, it shall be conclusively presumed that the negative cost of the Picture is as set forth in Pictures' said notice to Purchaser. If Purchaser demands that said matter be submitted for and determined by arbitration, such matter shall, within thirty (30) days thereafter, be submitted in writing in Los Angeles, California, to such national firm of certified public accountants as shall be acceptable to both Purchaser and Pictures, and, if said parties cannot agree upon said firm or accountants, then the firm of accountants to which the said matter shall be submitted shall be such national firm of public accountants as shall be designated by the American Arbitration Association. Both parties may submit [28] their views to the arbitrator in writing, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto with the force and effect of an arbitration award under Title 9, Part 3 of the Code of Civil Procedure of the State of California. The costs of any arbitration, pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator.

2. Purchaser agrees to keep full and accurate records relating to the distribution of the Picture. For a period of two (2) years after each transaction relating to the distribution of the Picture, a duly

Exhibit A—(Continued)

authorized representative of Pictures shall have the right of access to and inspection of the records at the places where the said records are ordinarily maintained, but only during business hours and at intervals not more frequently than semi-annually.

Purchaser shall render to Pictures reports with respect to the distribution of the Picture as follows:

(i) Purchaser shall render three (3) reports during the first thirteen (13) weeks after the Picture is in general distribution showing gross receipts from the distribution of the Picture and the costs and expenses in connection therewith.

(ii) Subsequent reports shall be rendered at intervals of approximately thirty (30) days, but after the first twelve (12) months after first exhibition of the Picture, Purchaser may render reports quarterly.

(iii) Purchaser shall pay to Pictures its share of net profits, if any, pursuant to this Agreement at the time of making each such report and in accordance therewith.

3. In case any controversy shall arise between the parties hereto as to any accounting by Purchaser with respect to the share of Pictures in the net profits of the Picture, the questions in controversy shall be submitted for determination to certified public accountants in the City of New York, acceptable to the parties hereto, and in the event of the failure of the parties to agree upon such firm of accountants, then said controversy shall

Exhibit A—(Continued)

be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city. Each party shall be given a reasonable opportunity, under all circumstances, to submit its views to the arbitrator, and a copy of each communication sent by either party to the arbitrator shall be sent to the other party. The arbitrator may also secure advice and information independently. The decision of the arbitrator shall be final and binding upon the parties hereto. The costs of any arbitration, [29] pursuant to this Article, shall be divided between the parties in such manner as shall be determined by the arbitrator.

XX.

It is understood and agreed that Sellers have and will have no lien or other right, title or interest whatsoever in or to the Picture, or the gross receipts or net profits thereof, and that the net profits of the Picture are referred to herein merely as a measure in determining the amount to which Pictures is and will be entitled under this Agreement. Nothing herein contained, however, shall be construed so as to prevent Pictures from proceeding against the Picture or any other property of Purchaser for the collection of any amounts which are due and unpaid hereunder, or as a waiver of any other right or remedy which Sellers may have at law or in equity.

Exhibit A—(Continued)

Nothing herein contained shall constitute a partnership between or joint venture by the parties hereto or constitute either party the agent or employee of the other.

XXI.

All notice which Pictures or Purchaser may be required or desire to give hereunder shall, unless otherwise specifically provided, be in writing. Such notices may be given by delivering them personally to an officer of either party authorized to accept service of process, or by addressing them to the addresses indicated below and by depositing them postage prepaid in the United States mail in the County of Los Angeles or by delivering them toll prepaid to a telegraph or cable company. In the event any notice is so mailed, telegraphed or cabled, it shall be conclusively deemed to have been given on the date of mailing or date of delivery to the telegraph or cable company. Purchaser's address for the giving of notices is P.O. Box 900, Beverly Hills, California. Pictures' address for said purpose is MCA Artists, Ltd., 9370 Santa Monica Boulevard, Beverly Hills, California. [30]

Either party may change its address specified in this Article by giving written notice to the other of such change, as herein provided.

In Witness Whereof, the parties hereto have executed this Agreement of Sale by their respective

Exhibit A—(Continued)

officers thereunto duly authorized as of the day and year first hereinabove written.

F. R. Pictures, Inc.

/s/ By Frank Ross

Frank Ross Productions, Ltd.

/s/ By Frank Ross

Twentieth Century-Fox Film
Corporation

/s/ By Lew Schreiber,

Its Executive Manager

Commitment Approved: /s/ by FLM, date 8/14/52; /s/ by J. DiMuves, Legal Dept. date 8/19/52.

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of [31] F. R. Pictures, Inc., the corporation that executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my

Exhibit A—(Continued)

signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles,
State of California.

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of Frank Ross Productions, Ltd., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,
Notary Public in and for the County of Los Angeles,
State of California. [32]

State of California,
County of Los Angeles—ss.

On this 19th day of August, in the year 1952,

Exhibit A—(Continued)

before me, Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Lew Schreiber, known to me to be the Executive Manager of Twentieth Century-Fox Film Corporation, the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,

Notary Public in and for the County of Los Angeles, State of California. [33]

EXHIBIT B

[Letterhead of Twentieth Century Fox Film Corp.]

F. R. Pictures, Inc., August 13, 1952
c/o MCA Artists, Ltd.,
9370 Santa Monica Boulevard,
Beverly Hills, California

Re: "The Robe" by Lloyd C. Douglas

Gentlemen:

Reference is made to an Agreement, dated August 11, 1952, by and between the undersigned,

Exhibit B—(Continued)

Twentieth Century-Fox Film Corporation (hereinafter called "Fox"), and RKO Radio Pictures, Inc., relating, among other things, to the production and distribution by Fox of a motion picture photoplay to be based upon or adapted from the novel entitled "The Robe", written by Lloyd C. Douglas, and to the acquisition by Fox of certain rights in said novel and in the other property in said Agreement set forth. Said Agreement is hereinafter called the "Fox-RKO Agreement".

Reference is also made to an Agreement of Sale, dated August 11, 1952, by and between you (F. R. Pictures, Inc.) and Frank Ross Productions, Ltd., as Sellers, and Fox, as Purchaser, also relating, among other things, to the production and distribution by Fox of said motion picture photoplay to be based upon or adapted from said novel entitled "The Robe", and to the acquisition by Fox of certain rights in said novel and in the other property in said Agreement of Sale set forth.

As an inducement to you to enter into, execute and deliver the said Agreement of Sale, dated August 11, 1952, Fox does hereby agree that, except as hereinafter expressly provided to the contrary, Fox will not, without first obtaining your written consent:

(1) Join in any amendment or other modification of the Fox-RKO Agreement, which amendment or other modification might adversely affect your profit participation under the said Agreement of Sale,

Exhibit B—(Continued)

[34] between you and Frank Ross Productions, Ltd. as the Sellers, and Fox, as the Purchaser;

(2) Enter into any agreement amending, modifying or supplementing the Fox-RKO Agreement in any manner or upon any terms or conditions, under or pursuant to which Fox or RKO will receive any benefit or consideration other than or in addition to that consideration to which Fox or RKO is entitled under the Fox-RKO Agreement as submitted to your counsel on August 13, 1952.

Notwithstanding the foregoing provisions hereof, it is expressly understood that Fox shall have the right to join in the amendment or modification of the Fox-RKO Agreement, without your consent, with reference to the following:

(a) Any or all of the changes in the Fox-RKO Agreement specified in that certain letter, dated August 8, 1952, addressed to Mr. Harry J. McIntyre by Joseph V. DiMuro, Esq., a copy of which letter was delivered to your counsel on August 13, 1952.

(b) The deletion from the Fox-RKO Agreement of the provision to the effect that the motion picture photoplay therein referred to shall star a leading man having a box office value substantially equal to that of Tyrone Power, provided neither Fox nor RKO shall receive any additional consideration or benefit therefor or in connection therewith.

Exhibit B—(Continued)

Yours very truly,

Twentieth Century-Fox Film
Corporation

/s/ By Lew Schreiber,

Its Executive Manager

Form Approved: 20th Century-Fox Film Corp.
Legal Dept. /s/ J. DiMuro. Date 8/20/52.

Accepted: F. R. Pictures, Inc., /s/ by Frank Ross;
Frank Ross Productions, Ltd., /s/ by Frank
Ross. [35]

State of California,
County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of F. R. Pictures, Inc., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my

Exhibit B—(Continued)

signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,

Notary Public in and for the County of Los Angeles, State of California.

State of California,

County of Los Angeles—ss.

On this 13th day of August, in the year 1952, before me Juanita J. Stansbury, a Notary Public in and for the said County and State, residing therein and duly commissioned and sworn, personally appeared Frank Ross, known to me to be the President of Frank Ross Productions, Ltd., the corporation that executed the within instrument and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto affixed my signature and official seal on the day and year in this certificate first above written.

/s/ Juanita J. Stansbury,

Notary Public in and for the County of Los Angeles, State of California.

[36]

[Endorsed]: Filed September 1, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STAY
PROCEEDINGS

To the Plaintiff, Frank Ross, and to his attorneys,
Pacht, Ross, Warne & Bernhard:

Please take notice that on the 21st day of November, 1955, at the hour of 10:00 a.m., or as soon thereafter as counsel may be heard in the court room of United States District Judge Thurmond Clarke, United States Post Office and Court House Building, 312 N. Spring Street, Los Angeles, California, defendant Twentieth Century-Fox Film Corporation will move the court for an order to stay proceedings in the above-entitled action on the ground that plaintiff's Complaint herein alleges a controversy arising out of that certain Agreement of Sale dated August 11, 1952, involving the proper allocation of costs and profits referable to the production and distribution of the photoplay, "The Robe", and that said Agreement provides that unresolved controversies relating to such matters shall be referred to [37] arbitrators and resolved in the manner provided in Article XIX of said Agreement.

Said motion will be based upon Title 9 of the United States Code, plaintiff's Complaint, defendant's Answer and defendant's Memorandum of Points and Authorities in support of said motion.

Dated: October 20, 1955.

MUSICK, PEELER & GARRETT,

/s/ By HAROLD F. COLLINS,

Attorneys for Defendant Twentieth
Century-Fox Film Corporation

Affidavit of Service by Mail attached. [39]

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

This defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation, for its answer to the complaint herein, admits, denies, alleges and moves as follows:

I.

Referring to paragraphs I and II thereof, defendant denies each allegation made therein except as otherwise admitted hereinafter. Defendant admits that plaintiff Frank Ross is a citizen of the State of California, but denies that he brings this action in behalf of the assignees of 8% of the interests in the proceeds of said written Agreement of Sale dated August 11, 1952, and denies that said assignees have the requisite diversity of citizenship or monetary interest in the claim and cause of action set forth in said complaint to invest this court with jurisdiction thereof. Defendant alleges that Twentieth Century-Fox Film Corporation, a

New York corporation, was a party to said [40] written Agreement of Sale dated August 11, 1952; that on or about September 27, 1952, said Twentieth Century-Fox Film Corporation, a New York Corporation, transferred its rights and obligations in and derivative under said Agreement of Sale, to this defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation; that at all times subsequent to September 27, 1952, this defendant, Twentieth Century-Fox Film Corporation, a Delaware corporation, has been authorized to conduct business in the State of California and in the Southern District of California.

The admissions, denials and allegations hereinafter directed to conduct imputed to "defendant Fox" in said complaint shall as to all conduct and events occurring subsequent to September 27, 1952, refer to this defendant, and as to all conduct and events which occurred prior to said date, shall refer to Twentieth Century-Fox Film Corporation, a New York corporation, later known as TCF Film Corporation, a New York corporation.

II.

Referring to paragraph III thereof and to that certain written Agreement of Sale dated August 11, 1952, which is identified as Exhibit A attached to said complaint, and to that certain written "Supplemental Agreement" dated August 13, 1952, which is identified as Exhibit B attached to said complaint, defendant admits the making thereof.

III.

Referring to paragraph IV thereof, defendant denies each allegation made therein and in connection therewith alleges that Pictures, Productions and their respective assignees, including plaintiff, have failed to perform the conditions of said Agreement of Sale, to wit, the provisions therein for the giving of notice as to any claimed inaccuracies in the statement of negative cost, distribution cost and net profits referable to the production and distribution of the photoplay, "The Robe", and the provision that in the [41] event questions and controversies relating to said matters are not settled by agreement of the parties, such matters shall be referred to arbitrators and resolved in the manner described in Article XIX of said Agreement of Sale, copy of which is attached as Exhibit A to the complaint, and which by this reference is adopted and impleaded hereat.

IV.

Referring to paragraph V thereof, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the several allegations made therein, except defendant admits that on or about February 19, 1953, Pictures filed a "Certificate of Winding Up and Dissolution" with the Secretary of State of the State of California.

V.

Referring to paragraph VI thereof, defendant denies each allegation made therein, except defendant admits that on or about December 5, 1953, de-

fendant delivered to plaintiff an incomplete statement of negative cost, and admits that on or about September 22, 1954, defendant delivered to plaintiff a final statement of negative cost covering the production of said photoplay, "The Robe", and that said final statement of negative cost was delivered within 90 days following the completion of the negative of said photoplay, as contemplated by the parties.

Defendant alleges that Pictures and plaintiff have failed and neglected to avail themselves of the right reserved to them in subsection (h) of Article XIX of said Agreement of Sale dated August 11, 1952, namely, to audit defendant's books and records for the purpose of verifying the correctness of defendant's statement covering the negative cost of said photoplay, "The Robe", either within 90 days subsequent to December 5, 1953, or within 90 days subsequent to September 22, 1954, or within the time period upon which the parties mutually agreed that said audit might be commenced, as set forth in a letter agreement between them, dated July 29, 1954, which extended [42] said time period to December 31, 1954; that by reason of said failure on the part of Pictures and plaintiff to commence any audit of defendant's books and records, defendant's said statement of negative cost is, by the express terms of subsection (h) of Article XIX of said Agreement of Sale, conclusively presumed to be correct; that by reason of said provisions of said Agreement of Sale and said foregoing facts, plaintiff is now estopped from asserting the existence of any con-

troversy with respect to said matters and is further estopped from asserting any rights against, demands or claims upon defendant by reason of said matters, either in this action or in any arbitration proceeding provided for in said Agreement of Sale in the event of any controversy respecting said matters.

VI.

Referring to paragraph VII thereof, defendant denies each allegation made therein, except it admits that the statement of negative cost furnished on or about September 22, 1954, reflects a total negative cost for purposes of profit-participation computation in the amount of \$3,837,785.98.

VII.

Referring to paragraph VIII thereof, defendant denies each allegation made therein, except it admits that said Agreement of Sale dated August 11, 1952, and said agreement between Fox and RKO Radio Pictures, Inc., dated August 11, 1952, contained the definitions, provisions and language set forth in said paragraph.

VIII.

Referring to paragraph IX thereof, defendant denies each allegation therein, except it admits that up to and including March 26, 1955, it charged to the production and distribution of the photoplay, "The Robe", various items and charges as more

particularly set forth in said tentative report as of said date. [43]

IX.

Referring to paragraph X thereof, defendant denies each allegation made therein.

For its affirmative defenses to said complaint, defendant states, alleges and moves as follows:

First Affirmative Defense

Defendant alleges that the complaint herein fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Defendant alleges that this court lacks jurisdiction over the subject matter pleaded in said complaint.

Third Affirmative Defense

Defendant alleges that this court lacks jurisdiction over the person of defendant in that defendant is informed and believes that there does not exist the requisite diversity of citizenship between defendant and one or more of the assignees and holders of fractional portions of the 8% interest in the assets of F. R. Pictures, Inc., collectively referred to in paragraph II of said complaint, and whose names, defendant is informed and believes, are as follows: Richard C. Ross, Harry Berman, Charles Miller, Maurie Lipsey, David Werblin, Taft Schreiber, Karl Kramer, Lawrence Barnett, Lew Wasserman, and Management Corporation of America, (a Delaware corporation).

Fourth Affirmative Defense

Defendant alleges that the complaint fails to join as parties plaintiff certain indispensable parties, to wit, the assignees of fractional portions amounting to a total of 8% interest in said Agreement of Sale dated August 11, 1952, which assignees are collectively referred to in paragraph II of said complaint, and whose names, defendant is informed and believes, are as follows: Richard C. Ross, Harry Berman, Charles Miller, Maurie Lipsey, David Werblin, Taft Schreiber, Karl Kramer, Lawrence Barnett, [44] Lew Wasserman, and Management Corporation of America (a Delaware corporation).

Fifth Affirmative Defense

Defendant alleges that, as clearly appears in said complaint, plaintiff challenges the accuracy of the statement of negative cost, the reports of distribution costs and numerous charges made by defendant referable to the production and distribution of the photoplay, "The Robe"; that by reason thereof there has arisen a controversy between plaintiff and defendant with respect to said matters; that said Agreement of Sale dated August 11, 1952, copy of which is attached to plaintiff's complaint as Exhibit A thereof, and which by this reference is adopted and impleaded hereat, specifically provides in paragraph XIX thereof that in case of any such controversy the questions in controversy shall be submitted for determination to certified public accountants in the City of New York acceptable to the

parties, and that in the event the parties fail to agree upon such firm of accountants, then said controversy shall be submitted for determination to such national firm of accountants in New York City as shall be designated by the American Arbitration Association in that city; that neither plaintiff nor his predecessors in interest nor any of his co-assignees has ever demanded or requested or notified defendant to proceed with said arbitration; that defendant is ready and willing to proceed to arbitrate the correctness of its distribution charges and other matters now properly subject to arbitration within the purview of said Agreement of Sale; and in the event an agreement cannot be reached as to an acceptable firm of accountants, defendant is agreeable that designation of said arbiter be made by the American Arbitration Association at New York, as provided in said Article XIX of said agreement; that by reason of said agreement and the foregoing facts and proposals, further proceedings in this action should be stayed by order of this court, and defendant moves for the entry of such an order. [45]

Wherefore, defendant prays that plaintiff take nothing by reason of his complaint herein and that defendant have judgment for its costs herein. Alternatively, defendant moves that said action be dismissed, or that all proceedings herein be stayed in order that the arbitrable issues presented may be

resolved by arbitration in accordance with the Agreement of Sale dated August 11, 1952.

MUSICK, PEELER & GARRETT,

/s/ By HAROLD F. COLLINS,

Attorneys for Defendant Twentieth
Century-Fox Film Corporation

Affidavit of Service by Mail attached. [47]

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF STUART L. KADISON IN
OPPOSITION TO MOTION TO STAY PRO-
CEEDINGS

State of California,
County of Los Angeles—ss.

Stuart L. Kadison, being first duly sworn, deposes and says:

I am an attorney at law, admitted to practice in the above entitled court, and am a member of the firm of Pacht, Ross, Warne & Bernhard, attorneys for plaintiff herein.

I have read and analyzed the moving papers of the defendant in support of its application for a stay of proceedings pending arbitration. Said application would appear to be based upon Title 9 U.S.C. Section 3, which said section provides for a

stay of proceedings under certain circumstances not here present as developed in the Memorandum of Points and Authorities in opposition to the motion to stay. The purpose of this affidavit is to demonstrate that even were this a proper action for a stay under the cited section, [48] nonetheless, a stay would not be available to the defendant by reason of its default in proceeding with the arbitration.

More particularly, on August 30, 1955 the plaintiff, through his attorneys, addressed a demand to the moving party wherein the provisions of paragraph XIX (h) 3 of the agreement here in issue were invoked, said demand consisting of a specification of issues to be submitted to the "arbitrators" as provided in said agreement. There is annexed hereto, marked Exhibit A, a true and correct copy of said demand.

Thereafter, on August 31, 1955, and prior to the commencement of this action, affiant received from the moving defendant a letter, which said letter did not constitute a reply to said demand. A true and correct copy of said letter of August 31, 1955, is annexed hereto and marked Exhibit B and specifically made a part hereof. Neither plaintiff nor affiant has had, as of the date of this affidavit, any reply to the "Demand for Arbitration", Exhibit A hereto.

By reason of the failure of the moving defendant to reply to said demand, said defendant is in default in proceeding with arbitration and by that reason not entitled, as a matter of law, to invoke

the provisions of Title 9 U.S.C. Section 3, were it otherwise applicable.

/s/ STUART L. KADISON

Subscribed and sworn to before me this 16th day of November, 1955.

[Seal] /s/ ANNA TAYLOR,
Notary Public in and for said
County and State [49]

EXHIBIT A

August 30, 1955

Twentieth Century-Fox Film Corp.
P. O. Box 900, Beverly Hills, California

Dear Sirs:

This notice is given you on behalf of our client, Frank Ross, successor in interest to F. R. Pictures, Inc., a dissolved California corporation, in and under that certain agreement of sale made and entered into between F. R. Pictures, Inc. and Frank Ross Productions, Ltd. on the one hand, and Twentieth Century-Fox Film Corporation, a New York Corporation, on the other.

Your attention is specifically invited to paragraph XIX (h) 3 of said agreement of sale. A controversy has arisen between our client and you as to the accountings for net profits of the Picture referred to in said paragraph of said agreement.

More particularly, our client questions and takes exception to the accounting procedures employed

by you in detemining net profits of said Picture in the following respects:

1. Mexican sales taxes have been charged against net receipts, although they are levied on gross receipts. 30% of said sales tax should be borne by the distributor.

2. Cuban sales taxes have been charged against net receipts, although they are levied on gross receipts. 30% of said sales tax should be borne by the distributor.

3. Revenues derived from the countries of [50] Brazil, Norway, Italy, The Phillipine Islands, France, Australia and Germany have been converted to United States dollars at excessively low rates of exchange.

4. Other matters to be included in the submission to the Arbitrator.

In accordance with paragraph XIX (h) 3 of said agreement, we request that you meet with us in order to select a Certified Public Accountant in the City of New York, acceptable to both parties. At the same time, we can perhaps arrive at a joint statement of the questions in controversy for submission to said Arbitrator.

Very truly yours,

PACHT, ROSS, WARNE &
BERNHARD,

/s/ By N. JOSEPH ROSS

/s/ STUART L. KADISON,

Attorneys for Frank Ross [51]

EXHIBIT B

Twentieth Century-Fox Film Corporation
Beverly Hills, California

Legal Department

August 31, 1955

Pacht, Ross, Warne & Bernhard
6535 Wilshire Boulevard,
Los Angeles 48, California

Attn: Mr. N. Joseph Ross and Mr. Stuart L.
Kadison. Re: Frank L. Ross.

Gentlemen:

On previous occasions we have advised you that questions relative to the ascertaining and distribution of net profits from our motion picture "The Robe" are matters strictly within the province of our New York Office. We are therefore forwarding your letter of August 30, 1955 to New York and suggest that you pursue this matter by writing either to Mr. C. E. McCartney, Comptroller of Twentieth Century-Fox Film Corporation or to Mr. Harry J. McIntyre of the New York Legal Department.

It is not our desire to be uncooperative in this matter, but we do not have any of the books or records involved at our disposal here at the studio.

Yours very truly,

TWENTIETH CENTURY-FOX
FILM CORPORATION,

/s/ By FRANK H. FERGUSON,
Resident Counsel

FHF:ms—cc: Mr. H. J. McIntyre [52]

Affidavit of Service by Mail attached. [53]

[Endorsed]: Filed November 17, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK H. FERGUSON IN
SUPPORT OF MOTION TO STAY PRO-
CEEDINGS

State of California,
County of Los Angeles—ss.

Frank H. Ferguson, being first duly sworn, deposes and states:

I am an attorney at law admitted to practice my profession in the above-entitled court and in all courts of the State of California. For the past several years I have been and now am Resident Counsel for Twentieth Century-Fox Film Corporation, with headquarters at its studio at Los Angeles, California.

I have read the Affidavit of Stuart L. Kadison, dated November 16, 1955, as served and filed herein.

On August 31, 1955, I received a letter dated August 30, 1955, directed to Twentieth Century-Fox Film Corporation by Pacht, Ross, Warne &

Bernhard, by N. Joseph Ross and Stuart L. Kadison as attorneys for Frank Ross, a copy of which letter is attached as Exhibit A to said Affidavit of Stuart L. Kadison; on August 31, 1955, [54] I dictated and dispatched a reply letter to said attorneys, a true copy of which letter is attached as Exhibit B to said Affidavit of Stuart L. Kadison.

Also, on August 31, 1955, following receipt of said letter dated August 30, 1955, I promptly caused a copy thereof to be prepared and dispatched by air mail to Harry J. McIntyre, an attorney whose office is in the Legal Department maintained at the principal offices of Twentieth Century-Fox Film Corporation at 444 West 56th Street, New York, New York. On September 2, 1955, while awaiting advice from said Harry J. McIntyre in New York, I learned through reading a news item published that date in Los Angeles daily newspapers (and also in New York newspapers) that on September 1, 1955, Frank Ross had filed an action in the above-entitled court against Twentieth Century-Fox Film Corporation claiming that excessive overhead and other improper items had been charged to the production and distribution of the photoplay "The Robe". Upon so learning that Frank Ross and his said attorneys had elected not to wait a reasonable period or any period of time for a response to their request for a meeting to select an acceptable arbitrator and to arrive at a joint statement of matter to be submitted to such arbitrator, as set out in their said letter dated August 30, 1955, I arranged on September 6, 1955, to consult Harold F. Collins, an attorney at

law and member of the law firm of Musick, Peeler & Garrett, respecting said matter; said date was the first opportunity to do so in view of the fact that Saturday, September 3, and Sunday, September 4, were business holidays, and Monday, September 5, Labor Day, was a national holiday. Promptly thereafter, to wit, on September 7, 1955, said Harold F. Collins, as Statutory Agent for Twentieth Century-Fox Film Corporation, reported he had been served with a copy of the Summons and Complaint herein; thereupon Musick, Peeler & Garrett and said Harold F. Collins, as trial attorneys for said Corporation, were authorized to prepare and file in its behalf such pleadings as [55] would present the matter of arbitration and an application for Stay of Proceedings in the above-entitled action in accordance with appropriate court procedures; on October 20, 1955, an Answer to plaintiff's Complaint was served and filed herein, together with a Notice of Motion to Stay Proceedings in this court, pending arbitration as provided in Article XIX of the Agreement of Sale which is attached as Exhibit A to plaintiff's Complaint herein. Affiant states that the hasty action on the part of plaintiff and his attorneys in commencing the present lawsuit one day after requesting arbitration and before defendant had a reasonable or any opportunity to respond thereto precluded any form of response except as presented in defendant's Answer and pending Motion for Stay of Proceedings herein; and that plaintiff is in no position to assert in good faith, or at all, that "defendant is in default in proceeding with arbitra-

tion * * *” as claimed in said Affidavit of Stuart L. Kadison.

/s/ FRANK H. FERGUSON

Subscribed and sworn to before me this 23rd day of November, 1955.

[Seal] /s/ MANYA SHARFF BECHTOLD
Notary Public in and for said
County and State aforesaid

Affidavit of Service by Mail attached. [57]

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 28, 1955, at Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge;
Deputy Clerk: Ed. J. Fisher; Reporter: John Swader;
counsel for Plaintiff: S. L. Kadison; counsel for Defendant: Harold F. Collins.

Proceedings: For hearing defendant's motion to dismiss, or to stay proceedings.

Attorney Kadison argues to the Court.

Attorney Collins argues to the Court.

Court Orders cause as to said motion to dismiss taken under submission.

JOHN A. CHILDRESS,
Clerk

[58]

In the United States District Court for the Southern District of California, Central Division

No. 18714-TC—Civil

FRANK ROSS,

Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
Defendant.

MINUTES OF THE COURT

Date: Nov. 29, 1955, at Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge;
Deputy Clerk: Ed. J. Fisher; Reporter: None;
Counsel for Plaintiff: No appearance; Counsel for
Defendant: No appearance.

Proceedings: Ruling on submitted matter.

The Court has this day granted the Defendant's Motion to Stay Proceedings, heretofor heard on Nov. 28, 1955.

Counsel notified.

JOHN A. CHILDRESS,

Clerk

[59]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank Ross, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order entered November 29, 1955, staying the above entitled cause.

Dated: December 7, 1955.

PACHT, ROSS, WARNE &
BERNHARD,

/s/ By STUART L. KADISON,
Attorneys for Appellant,
Frank Ross

[60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 64, inclusive, contain the original

Complaint;

Notice of Motion to Stay Proceedings;

Answer to Complaint;

Affidavit of Stuart L. Kadison;

Affidavit of Frank H. Ferguson;

Notice of Appeal;

Designation of Record on Appeal; and a full, true and correct copy of the Minutes of the Court for November 28, 29, 1955; in the above-entitled cause constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 13th day of January, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy Clerk

[Endorsed]: No. 14999. United States Court of Appeals for the Ninth Circuit. Frank Ross, Appellant, vs. Twentieth Century-Fox Film Corporation, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 16, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14999

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a New York corporation, JOHN DOES I through XX and DOES CORPORATIONS I through X, Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of Said Court:

The following is a statement upon which appellant intends to rely on the appeal herein.

1. The Court erred in rendering and making the Order herein appealed from, which stayed and abated further proceedings in said action.

2. The Court erred, as a matter of law, in concluding and holding that the contract sued upon in said action and the basis of plaintiff's Complaint, required an arbitration of the dispute upon which the claim of plaintiff is based, and for that reason further prosecution of said action was and is barred.

3. The Court erred, as a matter of law, in concluding and holding that the contract sued upon and the basis of plaintiff's claim was a contract in interstate commerce and subject to an Order staying

further proceedings in said action upon said grounds.

4. The Court erred, as a matter of law, in concluding and holding that the issues presented by the plaintiff's Complaint are, or could be construed to be, within the arbitration clause and language in said contract.

5. The Court erred, as a matter of law, in concluding and holding that the defendant was not in default for failure to proceed by way of arbitration to settle and determine the dispute between said parties, and that such default bars defendants' right to a stay of plaintiff's further prosecution of said action.

Designation of Record

Appellant designates for printing in the Record on Appeal the complete records and exhibits certified to this Court by the Clerk of the District Court.

Dated: January 20, 1956.

PACHT, ROSS, WARNE &
BERNHARD,

/s/ By CLORE WARNE,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1956. Paul P. O'Brien, Clerk.